IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF WOODINVILLE, a Washington municipal corporation, Respondent, v. NORTHSHORE UNITED CHURCH OF CHRIST, AND SEATTLE HOUSING AND RESOURCE EFFORT/WOMEN'S HOUSING EQUALITY AND ENHANCEMENT PROJECT, Petitioners.	)	No. 80588-1 En Banc Filed July 16, 2009

J.M. JOHNSON, J.—Tent City 4 is a movable encampment of homeless people in the Puget Sound area sponsored by nonprofit Seattle Housing and Resource Effort/Women's Housing Equality and Enhancement

Project (Share/Wheel). The encampment houses approximately 60-100 people and moves from place to place every 90 days. It relies on property owners to volunteer sites and in 2006 asked Northshore United Church of Christ (the Church) to host. The Church agreed to allow use of its property in the R-1 residential area around the church buildings in the city of Woodinville (City) and applied for a temporary use permit from the City. Several months before the application, the City had passed a six-month moratorium on all land use permit applications in the R-1 zone, pending completion of a study on sustainable development.[1] Relying on the moratorium, the City declined to process the Church's permit application.

The Church argues the City's (in)action conflicts with our cases considering article I, section 11 of Washington's constitution. That provision guarantees, "[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship, . . ." but also provides the provision, "shall not be so construed as to . . . justify practices inconsistent with the peace and safety of the state." *Id.*

Concerned that the encampment would go forward, the City sought,

[1] The moratorium was later extended for an additional six months.

and the trial court entered, an injunction against the Church and Share/Wheel, prohibiting Tent City 4 from proceeding without the necessary permits. The Court of Appeals upheld the City's denial of the permit based on the moratorium. *City of Woodinville v. Northshore United Church of Christ*, 139 Wn. App. 639, 162 P.3d 427 (2007). Based on our precedent construing article I, section 11 of the Washington Constitution, we hold that the City cannot apply a moratorium to refuse to consider a permit request from the Church and therefore reverse.

Facts and Procedural History

The main facts underlying this case occurred in 2006, but several important events occurred two years earlier. In 2004, Share/Wheel and Tent City, working with the Church, also sought a location in the City as a temporary home. The City offered to allow Tent City free use of a site on city property intended for a public park. The City, Share/Wheel, and the Church executed a contract spelling out conditions for the temporary use and the parties' rights and duties. In a relevant provision, the 2004 contract provides for Share/Wheel and the Church to "submit an application to locate a future Tent City at some other church-owned location, but . . . must agree

not to establish . . . any homeless encampment within the City of Woodinville without a valid temporary use permit . . . ." Clerk's Papers (CP) at 160. In 2004, Tent City spent three months on the city property pursuant to this contract and then moved on to other areas of King County.

Two years later, with the Church again as host, Tent City 4 sought to move back to the city. In the meantime, the City had adopted a moratorium on all temporary use permits in the R-1 residential zone where the Church is located. The moratorium lasted six months, and its purpose was to allow city planners to study environmental effects of new development. The City subsequently renewed the moratorium for another six months.

The Church planned to host Tent City 4 beginning in August 2006, but because Tent City 4's summer site host withdrew, the Church sought to accelerate its hosting to the months of May through July. Scrambling in late April, the Church applied for a temporary use permit to begin in May. The City refused to process the application, citing the moratorium on all permits in the R-1 zone. The Church alternatively asked the city council to let Tent City 4 move to the same parklands location where it had stayed in 2004 (which was outside the R-1 zone of the moratorium). After a public hearing and

input from the community, the city council rejected the proposal.

When the Church moved forward to host Tent City 4 on its property, notwithstanding the failure to get permits, the City brought an action in King County Superior Court for a temporary restraining order. The City also requested a permanent injunction blocking the Church and Share/Wheel from hosting Tent City 4 without obtaining the necessary permits.

Originally, the trial court denied the City's motion for a temporary restraining order and instead, sua sponte, entered an order allowing Tent City 4 to set up its encampment at the Church immediately. Tent City 4 moved onto church property. The City moved to dissolve the court's temporary order and to consolidate that hearing with a trial on the merits of the case. The case proceeded to a consolidated hearing on the merits.

A different judge was assigned to the case, and the trial court heard evidence over the next week and a half, after which it entered a final order. That order consolidated the motion for a temporary injunction with the motion for permanent relief. The court then ordered Tent City 4 to leave the city and enjoined the Church from hosting Tent City in the future without a permit. It held that the Church had breached the 2004 contract and that Tent City 4 was

creating a public nuisance under the City's zoning laws by operating without a permit. The court held that Washington's constitution and the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-2000cc-5, both required the city zoning restrictions to be narrowly tailored to achieve a compelling government purpose but that the City had met the standard. Attorney fees were denied, and the only issue the order failed to address was the amount of damages the Church owed the City for violating the 2004 contract.

The Church appealed. *Northshore United Church*, 139 Wn. App. 639. Division One of the Court of Appeals held that the trial court was correct that the Church had violated the 2004 contract. Even though the trial court had applied the wrong constitutional standard by applying strict scrutiny, the permanent injunction was upheld by the Court of Appeals, as was denial of attorney fees. The Church once again appealed.[2] This court granted review. *City of Woodinville v. Northshore United Church of Christ*, 162 Wn.2d 1019, 178 P.3d 1033 (2008). We hold the refusal to process the permit application was violative of rights under article I, section 11, and reverse.

Issues

[2] The City cross-appealed only the denial of attorney fees.

1. Whether the City's refusal to process the Church's requested permit based on an area-wide moratorium violated article I, section 11 of the Washington Constitution.

2. Whether the Church breached its 2004 contract with the City and, if so, whether this breach was justified by the City's refusal to process a permit.

Standard of Review

The parties dispute the appropriate standard of review. The Church requests de novo review on all issues while the City asks us to review the trial court's factual findings only for clear error. The unique posture of the case warrants brief explanation. The trial court consolidated the motion for a temporary injunction with a trial on the merits and heard testimony on every issue. We have no cases deciding the proper standard of review for such a situation, but there is persuasive guidance from federal courts (which have comparable court rules). As stated in one of those federal cases, where the trial court "combined the hearing on the injunction with a trial on the merits[,] . . . we review the district court's findings of fact for clear error . . . and its conclusions of law de novo." *Pinette v. Capitol Square Review & Advisory Bd.*, 30 F.3d 675, 677 (6th Cir. 1994) (citations omitted).

Analysis

A. The City's Application of a Moratorium To Deny the Permit Application Violated the Church's Exercise of Religion

Washington's constitution guarantees, "[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship" and also provides that this "shall not be so construed as to . . . justify practices inconsistent with the peace and safety of the state." Wash. Const. art. I, § 11.

The Court of Appeals did not decide whether this guaranty of our constitution is broader than the federal constitutional protection for religious freedom because the Church did not offer a complete analysis of the difference between the state and federal constitutions. *Northshore United Church*, 139 Wn. App. at 654.

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) articulates standards to determine when and how Washington's constitution provides different protection of rights than the United States Constitution. *Id.* at 58. Litigants brief the differences when we are faced with deciding whether a parallel constitutional provision affords differing protections. *State v. Reichenbach*, 153 Wn.2d 126, 131 n.1, 101 P.3d 80 (2004). But where we have "already determined in a particular context the appropriate state

constitutional analysis under a provision of the Washington State Constitution," it is unnecessary to provide a threshold *Gunwall* analysis. *Id.*

A strict rule that courts will not consider state constitutional claims without a complete *Gunwall* analysis could return briefing into an antiquated writ system where parties may lose their constitutional rights by failing to incant correctly. *Gunwall* is better understood to prescribe appropriate arguments: if the parties provide argument on state constitutional provisions and citation, a court may consider the issue. This is especially true where, as in many areas, the special protections of our state constitution have been previously recognized by this court. Listing the *Gunwall* factors is a helpful approach when arguing *how* Washington's constitution provides greater rights than its federal counterpart. But failing to subhead a brief with each factor does not foreclose constitutional argument.

Here, numerous cases in this court have already decided that the article I, section 11 freedom of religious sentiment, belief and worship "absolutely protects the free exercise of religion, [and] extends broader protection than the first amendment to the federal constitution . . . ." *First Covenant Church v. City of Seattle*, 120 Wn.2d 203, 229-30, 840 P.2d 174 (1992). The Church

has more protection under Washington's constitution.

Proceeding under article I, section 11, a party challenging government action must show two things: that the belief is sincere and that the government action burdens the exercise of religion. *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 152, 995 P.2d 33 (2000). The government must then show it has a narrow means for achieving a compelling goal.[3] *Id.*

There is no issue raised here of whether hosting Tent City is important or central to the Church's exercise (though the Church has never before engaged in such practice around or in its church). The City conceded in its briefing in this case the Church's sincerity of belief. The City has also not argued in its briefing that the moratorium fulfills a compelling goal and only offered argument that the moratorium did not substantially burden the Church's free exercise of religion. Thus, the only issue presented is whether the City's actions substantially burden the free exercise of the Church's religious "sentiment, belief [or] worship."

Government burdens religious exercise "[i]f the 'coercive effect of [an]

[3] Of course, the government may require compliance with reasonable police power regulation. *See* Wash. Const. art. I, § 11 (the right to religious belief and worship does not excuse practices inconsistent with peace and safety).

enactment' operates against a party 'in the practice of his religion . . . .'" *First Covenant*, 120 Wn.2d at 226 (alteration in original). This does not mean any slight burden is invalid, however.[4] If the constitution forbade all government actions that worked *some* burden by minimally affecting "sentiment, belief [or] worship," then any church actions argued to be part of religious exercise would be totally free from government regulation. Our constitution expressly provides to the contrary. The argued burden on religious exercise must be more, it must be substantial. Here, the total refusal to process a permit application is such a burden.

Unconstitutional burdens through government regulation were found in the two decisions of this court: *Munns v. Martin*, 131 Wn.2d 192, 930 P.2d 318 (1997) and *Open Door*. In *Munns*, St. Patrick's School was a state historic site and the Bishop of Spokane intended to change the church building use to a pastoral center. *Id.* at 195. Petitioner sought to enforce an ordinance to delay permitting for up to 14 months. This court held the

[4] When deciding if a government regulation is a substantial burden, courts should look at any alternatives the regulation leaves open. For example, at oral argument, the Church conceded it would be possible to house Tent City inside the Church. Worship traditionally takes place inside a church and this alternative would obviate many of neighbor/city legitimate concerns. We make no decision on such a regulation because the City did not allow such alternative.

potential burden of delay created an unconstitutional burden. *Id.* at 207. In *Open Door*, a church bought a building intending to renew its use as a place of worship, and the county ordered the church to apply for a conditional use permit. *Open Door*, 140 Wn.2d at 145-46. Clark County allowed the church to continue operating pending decision on an application, but the church brought suit rather than go through the process. We held the burden of properly applying for a permit was not an excessive burden on religion expressly noting, "we are not confronted in the case with the denial of a conditional use permit application . . . ." *Id.* at 149. If any government burden, such as applying for permits, were unconstitutional, we would have decided *Open Door* differently.

These cases conclude that a burden can be a slight inconvenience without violating article I, section 11, but the State cannot impose substantial burden on exercise of religion. *See also First United Methodist Church v. Hearing Examiner*, 129 Wn.2d 238, 249, 916 P.2d 374 (1996) (landmark designation reducing value of a church by half is an excessive burden).

Any state burden must be evaluated in the context in which it arises. The City properly did not dispute in court the sincerity of the beliefs nor their

importance to believers. Housing the homeless may be a part of religious belief or practice, but it is different from prayer or services, for example, which are at the core of protected worship. The Church has never before hosted the homeless on or in its property but has long continued to worship in a manner preferred by its congregation.

The context for the constitutional evaluation of any burden necessarily encompasses impact on others in the city. Housing the homeless affects those outside the church in a way that private prayer or religious services inside the church buildings do not. Indeed, a homeless encampment likely affects the neighbors who live nearby far more than it impacts most parishioners who spend only hours in church weekly while neighbors must live continuously with the encampment. Cities may mediate these externalities reflecting concerns for safety, noise, and crime but may not outright deny consideration of permitting. By way of analogy, while healing the sick is similarly connected to worship, a church must still comply with reasonable permitting processes if it wants to operate a hospital or clinic. This notion is expressly reflected in article I, section 11 providing, "the liberty of conscience hereby secured shall not be so construed as to . . . justify practices inconsistent with

the peace and safety of the state."

Applying these principles, the City's total moratorium placed a substantial burden on the Church. It prevented the Church from even applying for a permit. It gave the Church no alternatives. The moratorium lasted a full year, nearly equaling the 14 month moratorium we held improper in *Munns*, 131 Wn.2d at 195, 207. The City failed to show that the moratorium was a narrow means for achieving a compelling goal. Therefore, the City's action constituted a violation of article I, section 11 of our constitution.

Since we hold for the Church on state constitutional grounds, we need not, and therefore do not, decide whether there is violation of RLUIPA. Our decision rests solely on our state constitution. *See First Covenant Church*, 120 Wn.2d at 228.

B. The Church's Breach of the Property Use Agreement and the City's Duty to Process Permit Application

The Church signed a contract with the City in 2004 promising to obtain a valid permit before hosting Tent City at the Church in the future. The Church argues that the contract was only valid for 2004, and even if it breached, it was justified by the City's breach. The relevant contract

language, found at section 2.B. in the contract, reads:

> [Tent City] and one or more Woodinville-based church sponsor(s) may jointly submit an application to locate a future Tent City at some other church-owned location, but
>
> (1) must allow sufficient time in the application process for public notice, public comment and due process of the permit application; and
>
> (2) must agree not to establish, sponsor or support any homeless encampment within the City of Woodinville without a valid temporary use permit issued by the city.

CP at 160. The Church did not obtain a valid permit before hosting Tent City 4. Under the contract's clear language, the Church breached this contract.

The Church argues to limit the contract effect to 2004. It points to section 3 of the contract, which reads, "[Tent City] shall promptly vacate the Property no later than 40 days after August 14, 2004" and which allows the Church to "submit an application to maintain Tent City 4 at the Property for an additional 60 days, provided that a valid city permit is issued . . . ." *Id.* It also cites the first sentence of the contract: "THIS AGREEMENT FOR TEMPORARY USE OF CITY PROPERTY ('the Agreement') is hereby executed . . . ." *Id.* at 159. It also argues that section 2 is time-limited because it begins with: "[Tent City's] use of *the Property* pursuant to this

Agreement is expressly subject to the following conditions . . . ." *Id.* at 160 (emphasis added). "The Property" means the park, *id.* at 159, so section 2 must apply only to the park.

These arguments fail because they require the court to entirely disregard section 2 of the contract and courts avoid such rewriting of contracts. *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007).

The Church also argues we find the contract ambiguous and construe the contract against the City, as drafter. However, the contract expressly provides otherwise: "No ambiguity shall be construed against any party based upon a claim that the party drafted the ambiguous language." CP at 167. The contract is not ambiguous and the promise at issue is section 2: "church sponsor(s) may jointly submit an application to locate a future Tent City at some other church-owned location, but . . . must agree not to establish, sponsor or support any homeless encampment within the City of Woodinville without a valid temporary use permit issued by the city." CP at 160. This is simple and clear; it is not ambiguous. The parties obviously considered a future Tent City stay, and the Church breached by not obtaining "a valid

temporary use permit."

Though the Church breached, it alternatively argues that such breach was justified. On this theory, the City had a duty to accept and process the Church's permit application. When the City refused the permit application, citing the moratorium, the City breached that duty.

If a party materially breaches a contract, the other party may treat the breach as a condition excusing further performance. *Colo. Structures*, 161 Wn.2d at 588. Under the agreement, the Church had the duty to apply for a permit and the City had a corresponding duty to accept and process. All parties to a contract have duties of good faith and fair dealing. *Metro. Park Dist. v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986). When the City rejected the Church's application without even considering it, the Church was excused from full compliance. Though the Church did not provide sufficient processing time, as also required by the 2004 contract, this does not excuse the City's refusal to process the permit application, especially since the City actually had time to hold a public hearing.

Under the contract's clear terms, the Church promised not to host Tent City 4 until it obtained a permit, a promise it broke. Since the City would not

process the Church's permit application, the Church was excused from its performance under these unique circumstances.

Conclusion

The City violated the Church's constitutional rights under article I, section 11 when it refused to process the Church's permit application based on a total moratorium on temporary use permits in the area. Rather than seeking to impose reasonable conditions on the Church's project to protect the safety and peace of the neighborhood, the City categorically prevented the Church from exercising what the City concedes is religious practice. We therefore reverse the Court of Appeals.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Chief Justice Gerry L. Alexander
Justice Susan Owens
Justice Charles W. Johnson
Justice Mary E. Fairhurst
Justice Barbara A. Madsen
Justice Debra L. Stephens